Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

KEITH MANTELL and ISOGENICS, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Fifth and/or Fourteenth Amendments of the United States Constitution require notice and a hearing where a Petition for the Return of Property pursuant to Fed.R.Crim.P. 41(e) is filed?

(2) Whether the United States District Court for the District of New Jersey erred as a matter of law by denying Petitioners a hearing and opportunity to present a defense to the issue of laches and by applying the equitable principle of laches where the Motion for the Return of Property was filed within the six year statute of limitations?

(3) Whether the Fourth, Fifth and Eight Amendments to the United States Constitution was violated by the United States Government and the State of New Jersey when they improperly seized property in excess of the property agreed to be forfeited under the plea agreement and final order of forfeiture thereby denying Petitioners' rights against unreasonable seizures, due process and freedom from excessive fines?

PARTIES TO THE PROCEEDING

The following sets forth all of the parties to this proceeding of which the Petitioners seek review thereof:

United States of America
Mr. Keith Mantell
Isogenics, Incorporated (a New Jersey corporation)

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OPINION BELOW

On April 13, 1998, the United States Court of Appeals for the Third Circuit affirmed the judgment of the United States District Court for the District of New Jersey dated September 30, 1996. The Orders directly on review consist of U.S.D.J. Politan's Letter Opinion and Order of September 30, 1996; Final Order of Forfeiture by U.S.D.J. Sarokin of March 3, 1992; Consent Order by U.S.D.J. Sarokin of September 23, 1994; Unsealing Order by U.S.D.J. Haneke of January 25, 1996; Memorandum Opinion and Judgment by the United States Court of Appeals for the Third Circuit of April 13, 1998; and Order by the United States Court of Appeals for the Third Circuit of June 26, 1998.

STATEMENT OF JURISDICTION

The United States Supreme Court has jurisdiction to review this Petition for a Writ of Certiorari pursuant to 28 U.S.C.A. § 1254(1). The date of the judgment opinion by the United States Court of Appeals for the Third Circuit sought to be reviewed is April 13, 1998. The date of the United States Court of Appeals for the Third Circuit's denial of Petitioner's Petition for a Rehearing *En Banc* is June 26, 1998. Supreme Court Rules 29.4(b) and (c) do not apply in this case.

SCOPE OF REVIEW

Whether the Petitioners' were deprived of their property without notice and a hearing in violation of their Fifth and Fourteenth Amendments due process rights is a matter of law subject to plenary review.

Whether the District Court erred by denying Petitioners' Motion for the return of property under the equitable principle

of laches is to be determined as a matter of law and is subject to plenary review.

Whether the Petitioners' were deprived of their property without notice and a hearing in violation of their Fourth, Fifth, Eighth and Fourteenth Amendments were violated by the United States Government and the State of New Jersey when Petitioners had property seized in excess of the property agreed to be forfeited under the plea agreement and final order of forfeiture is a matter of law subject to plenary review.

STATUTORY PROVISIONS AND RULES INVOLVED

The Fourth Amendment of the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment of the United States Constitution states, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Eighth Amendment of the United States Constitution states "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

The Fourteenth Amendment of the United States Constitution states, in relevant part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . ."

Federal Rule of Criminal Procedure 41(e) provides in relevant part:

> A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the return of the property on the ground that such person is entitled to lawful possession of the property. The court *shall* receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings.

(emphasis in original).

STATEMENT OF THE CASE

In May of 1990, Petitioner Keith Mantell, a trained chemical engineer and successful and respected businessman, was arrested in New Jersey and charged with violation of 21 U.S.C. § 841(d) and 21 U.S.C. § 846. On May 22, 1990, United States Magistrate Judge Hon. G. Donald Haneke issued a seizure warrant for the contents of any and all brokerage accounts in the name of Keith Mantell and Leticia Mantell or Isogenics at Dean Witter Reynolds, Inc. Mack Center IV South 61 Paramus Road, Paramus, New Jersey 07652. (Appendix # 3). On October 7, 1991, Petitioner Mantell pled guilty to one count of conspiracy and was sentenced to a term of forty (40) months imprisonment.

At the time of Petitioner Mantell's arrest in May of 1990, government authorities confiscated property from both Petitioner Mantell and Petitioner Isogenics, Inc. The authorities confiscated, property including but not limited to:

* A residence located at 451 Ridgewood Road, Washington Township, New Jersey (hereinafter "451 Property");

* Two automobiles;

* Numerous securities as set forth in Schedule A;

* Twenty eight (28) United States Postal Service money orders of $700.00 each, for a total amount of $19,600.00;

* Five (5) Visa Travelers checks, No. 1092160470648; 1092160470649; 1092160470650; 1092160470651; 1092160470652; and

* Currency in the amount of one hundred five thousand two hundred forty eight dollars and fifty-six cents, $105,248.56 (hereinafter "Mantell Cash").

Numerous additional items of property owned by Petitioners Mantell and Isogenics were also later confiscated by authorities. The additional seizures of property includes but is not limited to:

* On June 13, 1990, a bank account owned by Isogenics, not by Mantell, in the amount of one hundred ten thousand seven hundred six dollars and ninety-three cents, $110,726.93 (hereinafter "Isogenics Bank Account");

* Additional cash from Petitioners in the amount of one hundred thousand dollars and no cents, $100,000; and

* On March 4, 1992, contents of the 451 Property which included personal property of Petitioner and business inventory of Isogenics, in the amount of six hundred ninety four thousand nine hundred fifty-two dollars and thirty eight cents, $694,952.38 (hereinafter "Contents of the 451 Property").

On April 5, 1991, Petitioners and the Government reached a plea agreement (hereinafter "Plea Agreement") which was summarized in writing. Pursuant to this agreement, Petitioners agreed to forfeit all the property and assets listed on "Schedule A," as attached to the Plea Agreement. The Plea Agreement stated that "the United States will not move to forfeit any assets of Keith Mantell that are not contained within 'Schedule A' and a trust of $100,000.00 would be established for his three children.

On March 3, 1992, the Honorable H. Lee Sarokin signed a Final Order of Forfeiture (hereinafter "Final Order") (Appendix # 6). This Final Order of Forfeiture specified that the only property that would be condemned or forfeited was the property listed and described in Schedule A of the Plea Agreement. In accordance to the Plea Agreement, Schedule A and the Final Order of Forfeiture, Petitioners agreed to forfeit the listed property which was seized from Petitioners at the time of Petitioner Mantell's arrest.

Despite the clarity of the Plea Agreement, Schedule A and the Final Order, the United States went beyond what they were permitted by seizing and retaining additional, non-scheduled assets which belonged to Petitioners. A comparison of the Petitioners' property that was agreed to be forfeited against the property that was seized and retained reveals that the United

States wrongfully retained property of the Petitioners, including but not limited to: the Isogenics Bank Account[1]; additional cash[2]; and the Contents of the 451 Property[3].

On September 23, 1994, Judge Sarokin signed a "consent" order[4] (hereinafter "Sarokin Order") for the disbursement of

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1. On June 13, 1990, the Government seized the Isogenics Bank Account. Petitioner Isogenics is a separate and distinct person from Petitioner Mantell and is therefore, not subject to or bound by the limitations on seizure of assets listed in the Plea Agreement, Schedule A and the Final Order. When Petitioners' counsel asked the Government and the bank to produce authority allowing this seizure, neither parties could produce such authority. The seizure and subsequent forfeiture of Petitioner Isogenics' property is unconstitutional and illegal.

2. A controversy exists over the amount of cash seized from Petitioners. The Government claims only $94,521.63 was seized. This is not consistent with the facts as claimed by Petitioners, a key reason why a hearing should have been held in this matter. Petitioner Isogenics had money in excess of $100,000.00 seized in addition to the total amount from Petitioner Mantell. Most importantly, the Government later admits to having in its possession an addition $100,000.00 seized from Petitioners outside the scope of the Plea Agreement and Schedule A. Further, according to the 1994 Consent Order for the Disbursement of Funds and Establishment of a Trust, the Government's bank account contained approximately $110,000.00, of which $107,004.74 was used to establish the corpus and interest of the trust. To reach this amount in such a short time, more than $100,000.00 had to be deposited in the Government's bank account. Thus, more than $205,248.56 was seized from Petitioners.

3. Contents of the 451 Property included personal items of furniture, books and other valuable items of Petitioner Mantell as well as business property and inventory of Petitioner Isogenics which consisted of various chemicals and laboratory equipment. The value of the Contents of the 451 Property is approximately $694,952.38.

4. Sarokin's Order was not consented to by all parties and thus, is (Cont'd)

funds and the establishment of a trust in the amount of $100,000.00 for Petitioner's three children. (Appendix # 8). However, the Sarokin Order varies from the agreed-upon language and specific provisions of the Plea Agreement. According to the Plea Agreement, the money intended by the Petitioner and by the Government to fund the $100,000.00 trust (hereinafter "Chang Trust") was to come from the forfeited Mantell Cash pursuant to Schedule A. However, the Sarokin Order establishing the trust recites, *inter alia*, that only $110,000.00 remained in the U.S. Marshall's account, and that of this, $107,004.74 was to be placed into the Chang Trust and the balance of $2,995.26 to be forfeited. Sarokin's Order is problematic because the stated $110,000.00 is not property of Petitioner Mantell; it is property of Petitioner Isogenics which was seized outside the scope of the Plea Agreement and Schedule A. Further, the Government is changing its position on the funding of the Chang Trust. The Government now admits to having in its possession an additional $100,000.00 seized from Petitioners which was not provided for in the Plea Agreement. Thus, the total seized from the Petitioners is $205,428.56. The Government is now asserting, contrary to the language of the Plea Agreement, that Petitioners agreed to fund the trust from the $205,428.56 seizure and not from the Mantell Cash ($105,248.56) as stated in the Plea Agreement. The Government's position is not the intent of the Plea Agreement.

(Cont'd)
not valid. An examination of the Sarokin's Order reveals that Petitioners did not sign the order. The only signatures that appear are those of Judge Sarokin, AUSA Bruce Repetto and Meredith Mantell Chang, the trustee who is not a party in the case against the Petitioners and who does not have any authority to sign documents on behalf of Petitioners. Further, AUSA Repetto presented this order without prior notification of such to Petitioners, without the presence of Petitioners at the hearing and without any legal representation on behalf of Petitioners. Thus, Petitioners were denied their due process rights of notice and a hearing.

According to the plain language and specific provisions of the Plea Agreement, the Chang Trust was to be funded out of the forfeited Mantell Cash listed in Schedule A.

Petitioners, far from delaying in pursuing the return of their property, acted vigorously through counsel to rectify matters. Petitioners, following the 1994 Sarokin Order and less than one year later, retained current counsel in 1995, who engaged in a long course of discussions with the U.S. Attorney's Office and with the New Jersey Department of Environmental Protection (NJDEP) to learn the details of this matter and to negotiate a resolution. Not until 1996, after numerous letters written to the United States Attorney's Office, did Petitioners learn that the NJDEP performed an emergency cleanup on March 1992. During this clean-up, over $700,000 of Isogenics chemicals and other goods were unlawfully seized and taken without due process and without compensation. Petitioners petitioned the District Court under Fed. R. Crim. P. 41(e) expecting to be given the opportunity to be heard and explain the reasons as to why the property was wrongfully seized.[5]

On September 30, 1996, United States District Judge Hon. Nicholas H. Politan denied the Petition without a hearing, alleging that Petitioner was barred under the equitable principle of laches, even though the Petition was filed less than two years after the Final Sarokin Order of Forfeiture in September of 1994, and less than six months after the case was unsealed by Judge Haneke revealing the full extent of seizures to Petitioners for the first time. In so ruling, the Court failed to hold an evidentiary

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5. On or about January 29, 1996, Judge Haneke signed an order unsealing the brokerage accounts of Petitioners at Dean Witter Reynolds, Inc. (Appendix # 10). Once Petitioners were able to determine the exact identity and amount of property taken, Petitioners filed a motion for the return of their property on July 2, 1996, pursuant to Fed.R.Crim.P. 41(e) (hereinafter the "Petition").

hearing. The Court effectively denied Petitioner a hearing.[6] Most critically, Isogenics, Inc., was never given a hearing in 1994 prior to Judge Sarokin forfeiting its money in an *ex parte* hearing, without notice or due process. Again, in September 1996 before Judge Politan, Isogenics was denied a hearing. Such procedures are fundamentally inconsistent with the Fifth and Fourteenth Amendments; are incompatible with the sacred rights of property from the Magna Carta to the present day; and is directly contrary to the decisions of the United States Supreme Court in the past twenty years which have consistently held that notice and a hearing is required when property is taken away from individuals.

Consequently, both Petitioner and Isogenics, Inc. have been denied their due process rights under the Fifth and Fourteenth Amendments and have been subject to excessive fines under the Eighth Amendment.

PROCEDURAL HISTORY

The court of first instance had jurisdiction over this matter pursuant to 18 U.S.C. § 3231 and Federal Rule of Criminal Procedure 41(e). Appellate jurisdiction of the United States Court of Appeals is founded on 28 U.S.C. § 1291. The prior procedural history is as follows: In May of 1990, Petitioner Mantell was arrested and charged with violation of 21 U.S.C. § 841(d) and 21 U.S.C. § 846. On May 22, 1990, United States Magistrate Judge Hon. G. Donald Haneke issued a seizure warrant for the contents of any and all brokerage accounts in the name of Keith Mantell and Leticia Mantell or Isogenics at

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6. Dismissal based on laches, when Petitioners seek relief from forfeiture Orders less than two years and four years old, is curious, to say the least. If allowed to stand, this case will be the shortest time for laches (less than six months) ever upheld in the federal courts in United States' history.

Dean Witter Reynolds, Inc. Mack Center IV South 61 Paramus Road, Paramus, New Jersey 07652. (Appendix # 3). On the same day, Judge Haneke also signed an order sealing Petitioners' file. (Appendix # 11). On April 5, 1991, Petitioner entered into a Plea Agreement with the United States. On September 5, 1991, a Consent Order was signed by the United States District Judge Hon. H. Lee Sarokin to exclude from the computation of time under the Speedy Trial Act for the period of May 30, 1990 to the date of the Order's issuance. On October 7, 1991, Petitioner appeared before Judge Sarokin to enter his plea of guilty and on October 9, 1991, Petitioner signed an application for permission to enter a guilty plea. On March 3, 1992, Judge Sarokin entered a Final Order of Forfeiture and on September 17, 1992, Petitioner was sentenced to a term of forty months. Two years later, on September 23, 1994 Judge Sarokin signed a "Consent" Order for the disbursement of funds and the establishment of a $100,000.00 trust for Petitioner's three children.[7] Later, on January 29, 1996, an unsealing order was signed by Judge Haneke to the brokerage accounts in the name of Petitioners at Dean Witter Reynolds. On July 3, 1996, current counsel filed an Entry of Appearance and a Petition for the Return of Property pursuant to Fed. R. Crim. P. 41(e). A responsive brief was filed by the United States Attorney's Office for the District of New Jersey on September 23, 1996. On September 30, 1996, in a letter opinion, United States District Judge Politan denied the Petition under the equitable doctrine of laches. On October 30, 1996, Petitioners filed a Notice of Appeal. On March 20, 1998, oral arguments were held by the United States Court of Appeals. On April 13, 1998, the United States Court of Appeals affirmed the United States District Court for the District of New Jersey in a Memorandum Opinion. In affirming the District Court, the United States Court of Appeals ruled that the equitable doctrine of laches did bar the

7. However, Petitioners were not party to this so-called "Consent" order and the Order was without notice or a hearing as to them.

Petitioner's action for the return of his seized property and that the seized Isogenics account was included in the property to be forfeited pursuant to the Plea Agreement. On May 28, 1998, Petitioner filed a Petition for Re-Hearing *En Banc*, which was denied on June 26, 1998. Petitioner now timely petitions this Honorable Court for a Writ of Certiorari to decide fundamental questions of the requirement of due process prior to the Government's wrongful taking of a private individuals' personal property.

REASONS FOR GRANTING THE WRIT

I.

THE UNITED STATES COURT OF APPEALS ERRED BY ENTERING A DECISION IN CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS.

A. The United States Court Of Appeal's Decision Affirming The Forfeiture Of Petitioners' Property Without Notice And/Or Hearing Is Contrary To The Decisions Of The First, Second, Sixth, Eighth And Tenth Circuit Courts Applying Fed. R. Crim. P. 41(e).

The United States Court of Appeal's decision affirming the United States District Court for the District of New Jersey decision allowing forfeiture of Petitioners' property without notice and/or hearing is in direct contradiction with the Fifth and Fourteenth Amendments, and is in conflict with other United States Circuit Courts, including the First, Second, Sixth, Eighth and Tenth circuits.

Federal Rule of Criminal Procedure 41(e) provides, in pertinent part, that when considering a motion for the return of unlawfully seized property, the court must "receive evidence

on any issue of fact necessary to the decision of the motion." At the core of the due process clause is a right to notice and a hearing "at a meaningful time and in a meaningful manner." *Sinola Lake Owners Assn. v. City of Simi Valley*, 864 F.2d 1475, 1481 (9th Cir. 1989). As such, due process ordinarily requires an opportunity for some kind of hearing prior to the deprivation of a significant property interest. *Id.*, at 1481-82.

This Court has consistently held that due process pursuant to the Fifth and Fourteenth Amendments requires a hearing where there is an important property interest at stake. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Bell v. Burson*, 402 U.S. 535 (1971); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975).

Moreover, this Court has consistently held that a taking of property may not occur under the Fifth Amendment without due process and just compensation, and a hearing is mandatory in such instances. *Hodel v. Irving*, 481 U.S. 704 (1987); *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Nollan v. California Coastal Commn.* 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, __ U.S. __, 114 S.Ct. 2309 (1994).

The protection of property interests from arbitrary government intrusions is as old as the Republic itself. *Fletcher v. Peck*, 6 Cr. (IOUS) 87 (1810); *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (17 US) 518 (1819); *Home Building & Loan Ass'n. v. Blaisdell*, 290 U.S. 398 (1934); *City of El Paso v. Simmons*, 379 U.S. 497 (1965); *United States Trust Co. of New York v. State of New Jersey*, 431 U.S. 1 (1977).

Numerous Circuit Courts have found that the plaintiff-

petitioner was denied due process where his property was taken without notice and or a hearing. For example, in *Cepulonis v. United States*, 543 F. Supp. 451 (E.D.N.Y. 1982), the plaintiff was deprived of his property without due process of law where notice of forfeiture of his automobile was by publication and mail to his home address while the plaintiff was in federal custody at all times subsequent to the seizure of the vehicle. In *Mora v. United States*, 955 F.2d 156 (2nd Cir. 1992), the plaintiff's *pro se* petition for the return of his property seized at the time of his arrest should not have been dismissed without a hearing as an untimely motion under Criminal Procedure Rule 41(e); regardless of whether the petition was treated as a Rule 41(e) motion or a complaint under the Tort Claims Act, the court should have taken evidence, determined if any of the property was still in the Government's possession and if not, determined whether the Government's conduct with respect to the seized property rendered the Government liable to plaintiff for damages.

Other Circuit Court decisions have held that plaintiff was denied due process when plaintiff's property was seized without a hearing. *See Rufu v. United States*, 20 F.2d 63 (2nd Cir. 1994) (District Court was required to take evidence and make factual findings to identify any item still in possession of government and any items that might have been lost); *United States v. Certain Real Property Located at 16510 Aston, Detroit, Wayne County, Michigan*, 47 F.3d 1465 (6th Cir. 1995) (defendant entitled to preseizure notice and opportunity to be heard when United States sought forfeiture of properties); *United States v. Giovanelli*, 998 F.2d 116 (2nd Cir. 1993) (claimant was not estopped from making his motion for return of funds by having withheld it until limitations statute had run against government despite claimant's 'actual notice' of government's belief that it had instituted forfeiture proceedings and government failed to notify claimant of forfeiture action,

although it was probably aware that claimant was living in his own home); *United States v. Mosquera*, 845 F.2d 1122 (1st Cir. 1988) (defendant was entitled to hearing in forfeiture proceeding); *United States v. 51 Pieces of Real Property in Roswell, New Mexico*, 17 F.3d 1306 (10th Cir. 1994) (as a general rule, due process requires that person be given notice and opportunity for hearing before being deprived of property interest); *United States v. Woodall*, 12 F.3d 791 (8th Cir. 1993) (fundamental fairness requires that either defendant or his counsel receive actual notice of agency's intent to forfeit); *United States v. Sarbello*, 985 F.2d 716 (3rd Cir. 1993) (proportionality analysis is required upon [RICO] defendant's prima facie showing that sentence of forfeiture of an interest in [RICO] enterprise is grossly disproportionate, or bears no close relationship, to seriousness of a crime in question).

In the case at bar, Petitioners Mantell and Isogenics were each deprived of valuable property several times without a hearing and without due process as required by the Fifth and/or Fourteenth Amendments and by precedent set by the courts. First, Petitioners were deprived of their valuable property, including cash in the sum of $205,428.56, the Isogenics bank account; personal property of Petitioner Mantell and business inventory of Petitioner Isogenics and other items left at 451 Ridgewood Road property and all were seized and forfeited without the opportunity or benefit of notice and/or a hearing. Petitioners never received notice that they would be deprived of property which was not listed in the Plea Agreement, Schedule A or the Final Order of Forfeiture. Instead of giving Petitioners notice of the seizure, the Government continued to seize property, even after the date of Petitioner Mantell's arrest. In May 1990, Petitioner Mantell was arrested and pursuant to his arrest, property was seized. However, the Government continued to seize Petitioners property after May 1990; on June 13, 1990 the authorities seized Petitioner Isogenics' bank

account; authorities seized the Contents of 451 Property and additional cash; and on March 3, 1992 the authorities removed chemicals belonging to Petitioner Isogenics from the 451 Property. At no time did the Government inform Petitioners that their property was being seized.

Second, Petitioner's due process rights were again violated when the United States District Judge Hon. Nicholas H. Politan denied Petitioner's 41(e) motion on September 30, 1996, without holding an evidentiary hearing, an act contrary to the aforementioned established case law. Rather than following precedent and established case law regarding the governmental taking of private property, Judge Politan acted contrary and flatly denied Petitioners' motion. Judge Politan failed, as dictated by established case law, to hold a hearing before allowing a seizure of a private person's property. As a result, Petitioners' due process rights were again violated.

Finally, Petitioners due process rights were violated a third time when the United States Court of Appeals continued to deny the Petitioner's right to notice and/or hearing when it affirmed the decision of Judge Hon. Politan. Again, the United States Court of Appeals acted contrary to established case law which provides that the Petitioners must be afforded the right to an evidentiary hearing before their property is seized.

Therefore, the District Court and the United States Court of Appeals acted contrary to established case law. As a result, Petitioners were denied their constitutional rights, under the Fifth and Fourteenth Amendments, to notice and/or an evidentiary hearing before their property was seized.

B. The United States Court Of Appeal's Decision Affirming That Petitioners' Motion Is Barred By The Doctrine Of Laches Is Contrary To The Decisions Of The Second, Third, Fourth, Seventh And Ninth Circuit Courts.

Petitioners were deprived of their right to a hearing before their 41(e) Motion was dismissed based on the doctrine of laches. The United States Court of Appeal's decision affirming the United States District Court for the District of New Jersey decision holding that Petitioners' 41(e) Motion is barred by the doctrine of laches, without holding a prior hearing before such determination, is in direct contradiction with the decisions of other United States Circuit Courts in similar circumstances.

The Third Circuit in *Burke v. Gateway Clipper, Inc.*, 441 F.2d 946 (3rd Cir. 1971), has held that where there is an issue of laches, the plaintiff must be able to come forward and prove that his delay was excusable and that it did not unduly prejudice the defendant. *See also E.E.O.C. v. Great Atlantic & Pacific Tea Co.*, 735 F.2d 69 (3rd Cir. 1984); *Waddell v. Small Tube Products, Inc.*, 799 F.2d 69 (3rd. Cir. 1986) (District Court failed to determine whether employee's delay in pursuing discrimination charge was excusable and whether employer was prejudiced).

Furthermore, various United States Circuit Courts, including the Second, Third, Fourth, Seventh and Ninth Circuits, have determined that the issue of laches and delay requires the District Court to look into and consider all pertinent facts and surrounding circumstances which requires an evidentiary hearing. For example, in *A.C. Aukerman Co. v. R.L. Chaides Const. Co.*, 960 F.2d 1020 (Fed. Cir. 1992), the District Court must weight all pertinent facts and equities in making a decision on a defense of laches. *See also Bennett v. Tucker*, 827 F.2d 63 (7th Cir. 1987) (District Court did not look at or

take into consideration the surrounding circumstances in deciding that the delay was unreasonable; the District Court's holding that was 'solely on the defendant's unsupported allegation that his claim was untimely' is an abuse of discretion); *Dorchester Manor v. Borough of New Milford*, 287 N.J. Super. 163 (1994) (where laches is asserted by the defendant and raised as an issue in the case, a full and factual hearing on both sides is usually required); *In re Exten*, 24 B.R. 888 (D. Md. 1982) (periods during which settlement negotiations take place should not be counted for purposes of laches); *Mogavero v. McLucas*, 543 F.2d 1081 (4th Cir. 1976) (in determining defense of laches, periods of settlement discussions before suit was filed should not be counted and remaining 19 months' delay was not fatal); *Portland Audubon Soc. v. Lujian*, 854 F.2d 1233 (9th Cir. 1989) (the district court failed to make a specific finding of prejudice or provide any explanation of how it considered the government to have been prejudiced); *Stone v. Williams*, 873 F.2d 620 (2nd Cir. 1989) (where plaintiff has not slept on her rights, but has been prevented from asserting them based, for example, on justified ignorance of facts constituting cause of action, personal disability, or because of ongoing settlement negotiations, delay is reasonable and equitable defense of laches will not bar action); *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990).

In fact, the Government's Brief itself acknowledges that Petitioners were entitled to a hearing when deciding the issue of laches and delay. The Government's Brief cites the case *White, id.* The Government's Brief, citing from *White*, 909 F.2d at 102, states:

> However, the defendant "is aided by the inference of prejudice warranted by the plaintiff's delay. The plaintiff is then *to be heard* to excuse his apparent laggardness and to prove facts manifesting an

> absence of actual prejudice." Clearly the greater the delay, the less the prejudice required to show laches, and vice versa. But the defendant is ultimately required to prove prejudice (given the defendant's burden to plead and prove laches under Fed. R. Civ. P. 8(c)) and 'may either rest on the inference alone or introduce additional evidence.

Id., (quoting *Giddens v. Isbrandsten Co.*, 355 F.2d 125, 128 (4th Cir. 1966) (emphasis added).

In the case at bar, the lower courts denied Petitioners' right to explain the circumstances surrounding this matter. The District Court and the United States Court of Appeals erred and acted contrary to established case law by failing to conduct an evidentiary hearing to examine all pertinent facts and surrounding circumstances in this matter. Contrary to established legal principals, the lower courts adjudicated the Petitioners' 41(e) Motion based solely on the record instead of holding an evidentiary hearing as required by precedent and established case law. The result of the lower courts' failure to follow precedent deprived Petitioners of their right to be heard by the Court. As a result of being deprived of a hearing, Petitioners were prevented from asserting his rights; Petitioners did not "sleep" on their rights.

Moreover, 28 U.S.C. § 2462 establishes a five year statute of limitations to pursue actions seeking recovery of forfeited property from the Government. Here, the Petitioners filed less than fours years after the 1992 Forfeiture Order, less than two years after the 1994 Forfeiture Order, and less than six months after the unsealingof the file by Judge Haneke which revealed the seizure of the Contents of the 451 Property. In the case at bar, Petitioners further did not sleep on their rights because they timely filed a motion for the return of property within the

statute of limitations and acted vigorously through counsel to rectify matters.

Because the file had been sealed in 1990, Petitioners were unable to discover the status of their property, despite repeated requests for documentation from the Government. The Forfeiture Orders were entered in 1992 and 1994, less than one year after Petitioners retained current counsel in 1995 and engaged in a long course of discussions with the U.S. Attorney's Office and with NJDEP to learn of the disposition of their property and to attempt a settlement of this matter. Not until 1996, after numerous letters written to the United States Attorney's Office, did Petitioners learn of the disposition of their property. They discovered that the NJDEP had performed an emergency cleanup on March 1992, seizing an additional $700,000 of Isogenics chemicals and other goods without due process and just compensation. No forfeiture proceeding ever was convened and to this day, this property remains, unlawfully, in the Government's hands. As soon as Petitioners were able to determine the exact identity and amount of property taken, Petitioners timely filed a motion for the return of his property on July 2, 1996. Finally, the Government is in no way prejudiced by Petitioners' Motion because all during the time Petitioners were seeking information regarding their property, the Government was in possession of that information and Petitioners had no way to assert their rights any sooner than they did.

Therefore, Petitioners' rights were violated because Petitioners were not afforded the opportunity of a hearing to explain the circumstances surrounding this case; to demonstrate that Petitioners did not "sleep" on their rights by timely filing the 41(e) Motion; and that there was no prejudice to the Government.

C. The United States Court Of Appeal Erred In Affirming The District Court's Decision That The Seizure Of The Isogenics Bank Account Was Within The Plea Agreement.

The Third Circuit in addition to all United States' courts recognize that the Government may not seize property without due process of law. Ownership is a property interest worthy of substantive due process protection. *Independent Enterprises v. Pittsburgh Water*, 103 F.3d 1165, 1180 (3rd Cir. 1997). A property owner claiming "ownership" rights is protected under substantive due process against arbitrary and irrational governmental deprivation. *DeBlasion v. Zoning Bd. of Adjustment*, 53 F.2d 592, 601 (3rd Cir. 1995). Due process will ordinarily require an opportunity for some kind of hearing prior to the deprivation of a significant property interest. *Sinola Lake Owners Assn. v. City of Simi Valley*, 864 F.2d 1475 (9th Cir. 1989). To give up "ownership" of property without just compensation is an act found to have violated due process since the founding of our nation. *See Calder v. Bull*, 3 Dall. 385 (1798) (The people of the United States erected their Constitutions, or forms of governments, to establish justice, to promote general welfare, to secure the blessings of liberty; and to *protect their persons and property from violence*.)

In the instant case, the Petitioners had property seized without notice and in violation of the Plea Agreement. The Plea Agreement, in Schedule A, listed all of the property that was to be forfeited by the Petitioners. Notwithstanding this bargained-for, binding agreement, the Government knowingly and willfully violated this Plea Agreement. The Government admitted to seizing and retaining cash in the sum of $205,428.56; the Isogenics bank account; personal property of Petitioner Mantell and business inventory of Petitioner Isogenics and other items left at 451 Ridgewood Road property. This was property not listed under the Plea Agreement, Schedule

A or Final Order. Thus, the Government's seizure and retention is in violation of the Plea Agreement and orders by the Court.

Furthermore, when the Government seized this property, the Government failed to give Petitioners notice of such seizure before the seizure occurred. As a result, Petitioners never knew that their property had been seized and destroyed. Moreover, Petitioners also never consented to Sarokin's Order which again deprived them of their valuable property without notice and a hearing. Because Petitioners did not consent to the seizure and forfeiture of property outside that property specifically listed in Schedule A, this property was improperly and illegally taken from Petitioners and was taken without just compensation. Therefore, Petitioners demands the return of cash in the sum of $205,428.56; the Isogenics bank account; personal property of Petitioner Mantell and business inventory of Petitioner Isogenics and other items left at 451 Ridgewood Road property which was seized and retained by the Government in violation of Petitioners' Fifth and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, the Petitioner's Petition for a Writ of Certiorari should be granted. The United States Court of Appeals' decision conflicts with the decisions of this Honorable Court and with circuit courts which have determined that Petitioner's due process rights are violated where Petitioner is denied notice and/or an evidentiary hearing when Petitioner's property is wrongfully taken and where Petitioner was denied an evidentiary hearing on the issue of laches. In order to resolve this conflict in the law and in the courts, the United States Supreme Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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